SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 343.

STATE OF NEW YORK, STATE OF DELAWARE, STATE OF INDIANA, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

No. 344.

STATE OF MAINE, STATE OF NEW HAMPSHIRE, STATE OF VERMONT, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 345.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BEAVER, MEADE AND ENGLEWOOD RAILROAD COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE STATES OF ARKANSAS, KANSAS, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH DAKOTA AND TEXAS: ARKANSAS PUBLIC SERVICE COMMISSION, THE KANSAS CORPORATION COMMISSION, THE KANSAS INDUSTRIAL DEVELOPMENT COMMISSION, THE NEBRASKA STATE RAILWAY COMMISSION, THE PUBLIC SERVICE COMMISSION OF THE STATE OF NORTH DAKOTA, THE OKLAHOMA CORPORATION COMMISSION, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA, AND THE RAILROAD COMMISSION OF TEXAS, APPELLEES.

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Opinions Below.

The opinion of the District Court (R. 1411) is reported in 60 F. Supp. 856. The report of the Interstate Commerce Commission (R. 62) appears in 262 I. C. C. 447, and the Supplemental report (R. 432) appears in 264 I. C. C. 41.

Statement of Case.

A statement of the case is fully set forth in the brief for The United States and The Interstate Commerce Commission.

Statutes Involved.

Sections 1, 3, 13, 15 and 15a, of the Interstate Commerce Act, as amended, and The Transportation Act of 1940, as pertinent to this proceeding are set forth in the Appendix to the brief of The United States and The Interstate Commerce Commission. To avoid duplication, they will not be reproduced here.

Summary of Argument.

Confiscation does not follow as a matter of course from the finding of the Commission that the less-than-carload traffic as a whole is not bearing its full costs, and the order to reduce the class rates in Western Trunk Line and Southwestern Lines Territories. The finding covers *all* less-than-carload traffic; the order applies only to less-than-carload traffic moving on class rates—the highest of all rates, but does order an increase in minimum charge on *all* less-than-carload traffic from 55 cents to 75 cents. Rates are confiscatory only if they are the cause of the operating deficiency; in this instance failure to procure a reasonable share of the business, rather than the rates, is the cause of the failure of less-than-carload traffic to earn a fair return.

Where the Commission finds the rates to be unlawful under section 3 (1) of the Act, and exercises its legislative power under section 15 to prescribe lawful rates for the future, it is not required to grant the carriers an alternative and there need not be a common source of discrimination.

The Commission did not construe the 1940 Amendment as changing established principles of rate making, but on the contrary construed it only as enlarging the group of objects protected against discrimination by including therein regions, districts and territories.

The evidence required to establish discrimination against regions, districts, and territories, is not identical with the evidence required to establish discrimination against particular persons, firms, localities, etc., and it is not necessary to prove injury to individual shippers to establish unlawful discrimination against regions, districts and territories.

There was substantial evidence of unlawful discrimination against Western Trunk Line, Southwestern Lines, and Southern Territories, and of injury to these territories resulting from such discrimination.

The Commission does not lose its legislative power to prescribe rates for the future once it has prescribed such rates. The legislative power is a continuing power, and the fact that in various proceedings during the past years, the Commission has prescribed many of the class rates now found to be unreasonable for the future, is of no consequence in this proceeding.

The decision and order of the Commission in *Ex Parte* 162, increased railway rates, fares and charges, 1946, have not altered the rate situation under the Commission's orders in the instant case and have not made the Commission's orders in the instant case obsolete and impossible of enforcement according to their terms.

ARGUMENT.

I.

THE WESTERN RAILROADS FAILED TO ESTABLISH THEIR CLAIM OF CONFISCATION.

To support their claim of confiscation, the Western Railroads place chief reliance upon their contention that the findings and order of the Commission establish confiscation as an inescapable conclusion.

The argument runs as follows: The Commission found that less-than-carload traffic, except possibly in Southern Territory, does not return the full cost of handling such traffic;

The Commission ordered a reduction in the class rates in a part of the Western District;

Some of the less-than-carload traffic in the Western District moves on class rates, and therefore the order is confiscatory.

The conclusion violates every principle of sound reasoning. In the first place, it assumes that which is not established, *i. e.*, that the level of the class rates rather than some other condition, is the cause for the failure of the less-than-carload traffic to return sufficient revenue. The fact is, as will be hereinafter shown, it is not that the rates are so low as to cause a loss, but that they are so high that the carriers cannot procure a sufficient share of the traffic under them for economical operation.

The conclusion assumes that the portion of the less-than-carload traffic moving at class rates has the same revenue producing characteristics as the entire body of less-than-carload traffic. This assumption is contrary to the fact. The fact is that the rates on that portion of less-than-carload traffic moving on class rates, are the highest of all rates. The finding of the Commission ap-

plied to all less-than-carload traffic; the reduction was ordered only on that portion moving on class rates.

There is a further undisclosed fact in the argument of the Western Railroads, *i. e.*, the Commission ordered an increase in the minimum charge on all less-than-carload traffic from 55 to 75 cents. (1)

The Unprofitableness of Less-Than-Carload Traffic Is Not Due to Lack of A Sufficiently High Class Rate Level.

Because of their excessively high level, the class rates in the West have failed to hold any considerable amount of less-than-carload traffic. As a consequence, the traffic has not proved profitable. It is not the low level of the rates, but rather the unreasonably high level, which has caused the unsatisfactory revenue results. So little less-than-carload traffic was procured by the Western Railroads prior to the war, that the average amount moved in each car was but 4.3 tons. (R. 906) At times, cars moved with as little as one thousand pounds. (R. 906)

To meet this condition, the carriers voluntarily instituted so-called carload mixture rates, under which many items could be mixed to make up a carload and move on rates very much lower than the established less-than-carload rates. (R. 907) Commodity rates were established to provide much lower carload rates on normally less-than-carload traffic. (R. 907) Freight forwarders used these arrangements to ship by carload, shipments which were actually less-than-carload shipments. All this tended to reduce the loading of less-than-carload traffic. (R. 907)

Hoping to regain this business, the carriers throughout the West published exception rates, and rate scales, very greatly below the established class rate levels, and

(1) Subsequently increased to $1.00. **Increased Railway Rates, Fares and Charges 1946**, — I. C. C. —.

in fact this practice became so universal, that the exception rate became the rule rather than the exception, and the classification became a virtual museum piece. These rates were as low as, or lower than, the rates prescribed by the Commission in the order now under attack. (R. 442-448) In the proceedings in the District Court, a witness for the Western Railroads testified that should these carriers attempt to bring these voluntarily reduced rates up to the level of the class rates prescribed by the Commission, *it would result in a decrease rather than an increase in revenue.* (R. 915)

When rates are unreasonably high, it is not important whether the carriers are or are not able to earn a return under them. The public's right to reasonable rates is paramount to the right of the carrier to a fair return. The evidence established that the class rates on less-than-carload traffic were unreasonably high, and in fact too high to move any considerable amount of the traffic. Upon such evidence the Commission found them to be unreasonable and prescribed reasonable rates to be applied in the future. As stated by this Court in *Covington & L. Turnpike R. Co. v. Sanford*, 164 U. S. 578, p. 596:

> The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.

And the public may not be assessed unreasonable rates on that portion of the less-than-carload traffic moving on class rates, merely because the whole body of less-than-carload traffic is not profitable. This Court, in *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, p. 549, stated:

> But whether the carrier earned dividends or not sheds little light on the question as to whether the

rate on a particular article is reasonable. *** if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article.

See also to the same effect, *Wood v. Vandalia R. Co.*, 231 U. S. 1.

The Western Railroads Did Not Prove Their Claim of Confiscation.

Though tardily, the Western Railroads apparently came finally to the conclusion that their contention that the decision and order of the Commission in themsleves established confiscation, could not be sustained, and sought to offer independent proof of confiscation before the District Court. While finding that the claim of confiscation "came somewhat late", the District Court received and considered this evidence.

Whether the District Court erred in receiving and considering this evidence, under the circumstances of this case, has become academic. The District Court did receive and independently consider the evidence, and concluded that it failed "to measure up to the required standard of certainty by way of proof as to transportation costs for particular commodities". (R. 1438) The only important question at this point, is whether or not this court shall itself consider this evidence to determine whether or not it reaches the same conclusion thereon as did the District Court.

It should be conceded by all, that it not only is desirable, but absolutely essential to orderly procedure, that all evidence upon which a proceeding is to be determined, shall first be submitted to the Commission. To make a general practice of trying proceedings piecemeal, with the Commission having before it but a part of the

evidence upon which the cases are ultimately to be determined, can lead to nothing but chaos and futility.

This proceeding is an excellent example of withholding evidence from the body having the original duty to decide. In their petition to the Commission for reconsideration, while alleging confiscation in the broadest generalities and almost as a matter of form only, these carriers not only failed to request the Commission to hear and consider evidence on the subject of confiscation, they concluded their petition with the allegation that, "There is no necessity for a rehearing in this proceeding; *** this for the reason that the record as made by respondent carriers in the Western District was as complete as it was possible to present." (R. 114)

If the Western Railroads earnestly believed that the rates required under the decision and order of the Commission would, as to a portion of the traffic, result in confiscation and that evidence to establish such confiscation could be adduced, it is submitted that they should have so alleged in their petition to the Interstate Commerce Commission, and should have set forth with particularity the nature of this evidence together with an offer to present same before the Commission. Rather than doing this, they chose to advise the Commission that they had no further evidence to offer; that the record was as complete as they could make it.

Whatever may be the right of a utility to an independent judicial determination on the issue of confiscation, it would appear that the Western Railroads already have been protected in such right far beyond any constitutional requirements. Clearly they should have offered to present all of their evidence to the Commission; clearly they should not have advised the Commission that they had done so, and then seek to bring additional evidence before the District Court. And now that the

District Court has heard and weighed this evidence and decided adversely to the claims of the Western Railroads, it is submitted that this Court is not required to make an independent examination of this evidence with a view to possible substitution of its judgment thereon for the judgment of the District Court.

II.

THE FINDINGS OF THE COMMISSION THAT THE COSTS WITHIN THE VARIOUS TERRITORIES WERE NOT SO SUBSTANTIALLY DIFFERENT AS TO WARRANT DIFFERENT RATE LEVELS WAS SUPPORTED BY THE EVIDENCE.

By twisting the findings of the Commission in a most extraordinary manner, the Western Carriers at pages 30 to 36, inclusive, of their brief, attempt to induce the Court to believe that the Commission found the costs of handling less-than-carload traffic in the Western District are from 20 to 40 per cent higher than similar costs in the Eastern District. The Commission made no such finding, nor would the evidence have sustained such finding.

To substantiate their contention, the Western Railroads treat the Pocahontas territory as being a part of Official Territory, and consider actual average loading of less-than-carload traffic, rather than identical loading as a proper test for relative costs. As we shall hereinafter demonstrate, this is exactly contrary to the judgment of the Commission as to proper treatment for comparative cost purposes. Also, the findings the Commission did make included costs for the entire Western District, and its order covered only Western Trunk Line and Southwestern Lines, Territories and did not cover Mountain-Pacific Territory.

The Pocahontas Territory is a small coal producing area sandwiched in between Official and Southern Territories. As its traffic consists predominately of coal, the Commission concluded that for purposes of a cost study, it should be treated separately, and it was so treated. All of the comparisons the Western Railroads make between costs in the Western District and costs in what they term the "lower portion of Eastern" are comparisons with Pocahontas Territory, which is not, and was not treated by the Commission as, a part of official Territory.

As hereinbefore shown, the very high class rates in the West have so far discouraged less-than-carload traffic as to result in very light loading of the cars. The lower basis of rates in the East results in heavier loadings in that district. We then come to the strange result that because the very high rates in the West had, by 1939, reduced the loading to the near vanishing point (4.3 tons per car), the carriers contend this demonstrates the higher cost of moving less-than-carload traffic in the West. Using the same basis of reasoning, we are forced into the vicious circle where the higher the rates, the lower the average loading, making for even higher costs, which in turn justify yet higher rates, and so on *ad infinitum*.

So far as less-than-carload traffic is concerned, the only reasonable basis for a study of comparative costs is on assumed identical average loads. It brings the study to a common denominator. If it is not used, you run into the anomolous situation whereby the very fact of unreasonable rates precludes the public from ever obtaining relief.

And when we come to the findings of the Commission as to relative costs in Official Territory, excluding Pocahontas, and based on identical loading of less-than-car-

load traffic, a very different picture appears than that painted by the Western Railroads. The following is taken from the report of the Commission. (R. 198)

Relative Cost Indices (1939) for Less-Than-Carload Traffic Having Hauls of 100, 300 and 500 Miles Based on Assumed Identical Load of 5 Tons. (U. S. Average-100)

		Col. 1.	Col. 2.
Eastern (Including New England)	100 miles	102	98
	300 miles	105	101
	500 miles	107	103
Western Territory	100 miles	108	114
	300 miles	104	109
	500 miles	102	107

Col. 1—Out-of-pocket cost.
Col. 2—Out-of-pocket cost plus constant expenses solely related to less-than-carload.

This proper comparison shows that the costs in the West are substantially similar to Eastern costs on less-than-carload traffic, and the Commission was justified in so finding. Also, it must be recalled that this comparison includes in the Western costs, all of the vast area of Mountain-Pacific Territory,—almost half the Nation and virtually all of the most rugged mountainous topography.

The Commission Did Not Find That Carload Costs in the Western District are 16 to 18 Percent Higher Than Eastern Costs.

The table shown in the report (R. 194) and referred to by the Western Railroads at pages 37-41 of their brief, can be used as well to show the Commission found Western Costs lower than Eastern Costs as it can to show the reverse. For example, using the entire United States as 100 per cent, the table shows, carload costs, Eastern, including New England, based on identical loads, to be higher than Western costs on out-of-pocket basis for all distances shown. At 100 miles the Eastern costs are 106 per cent, the Western costs 98 per cent; at 500 miles Eastern costs are 105 per cent, Western costs 99 per cent. The picture is the same on an out-of-pocket cost basis using actual average load comparison; Western costs are lower than Eastern costs. The situation is reversed only on fully distributed cost basis, where Western costs are slightly above Eastern costs.

There is nothing in the part of the report referred to by the Western Railroads to justify the statement that "the Commission found" that the Western costs are 16 to 18 per cent higher than Eastern costs. The Commission set out in the table referred to (R. 194) the entire picture, it did not find that any one part thereof was conclusive. It would be just as accurate to say that the Commission found the Eastern costs were higher than the Western costs, as that is what is shown by as large a number of comparisons on the table as otherwise. But the Commission considered the whole picture, not the data shown on just this one chart, and from all of the evidence, and exercising its expert judgment thereon, properly found that the costs within these two territories did not vary substantially, and were not sufficiently different to justify different rate levels.

The only question for this court is whether or not there was evidence to support this conclusion, and there was ample evidence. It would be without precedent for this court to substitute its judgment for that of the Commission on this very elaborate cost evidence.

The Commission Did Not Find That the Western Costs for Box-Car Traffic and Gondola and Hopper Car Traffic at the Average Haul are 1[illegible] and 24 Percent Higher Respectively Than Eastern Costs.

All that has just been said hereinabove applies with equal force to the mis-statement of the Western Railroads appearing at page 41 of their brief, and discussed on pages 41 to 43 thereof. They rely on the table set forth in the Commission's report at page 577. (R. 192) As to box-car traffic, at all distances shown, it appears from this table that the out-of-pocket costs are lower in the West than in the East, whether New England is included or excluded from the East and whether on the basis of identical loads or actual average loads. On a fully distributed cost basis the result is slightly changed.

We might take box-car traffic on assumed identical loads of 25 tons, on an out-of-pocket basis, and say the Commission found Eastern costs to be 7 per cent higher than Western costs. Or we could take any of a great many other comparisons shown on the chart and state that the Commission found Western costs lower than Eastern costs. But such statement would be contrary to the facts. The Commission no more made such findings than it made the findings claimed by the Western Railroads. It considered the whole picture, not an isolated part of it.

The situation depicted by the chart as to Gondola and Hopper car traffic is substantially the same as to box-car traffic. On some bases Western costs are lower

than Eastern and or other bases slightly higher. At all events, it is hardly expected that any substantial amount of class rate traffic is going to move in Gondola and Hopper cars.

Throughout all of their comparisons the Western Railroads insist upon comparing the entire Western District (about two-thirds of the entire country) with the minute area referred to as the Pocahontas region, an area considerably smaller than the State of Kansas. The impropriety of such comparisons must be obvious on their face, and certainly disclose the desperate character of the attempt of the Western Railroads to nullify the decision of the Commission.

As previously stated, the comparisons used by the Western Railroads are based on cost data which included all of Mountain-Pacific Territory in the Western District costs. This decision affects only Western-Trunk-Line and Southwestern Lines Territories in the Western District. The same witness who prepared the cost data used as the basis for the charts relied upon by the Western Railroads, also placed in evidence cost data treating Western Trunk Line and Southwestern Lines Territories separately from Mountain-Pacific territories. The results of this study appear in Witness Edward's Exhibit No. 3. (R. 5267) (In Evidence R. 1558) The studies which were the basis of the charts relied on by the Western Railroads were put in subsequently by this same witness, as were other refinements, to meet requests of various parties. Exhibit 3 was not withdrawn. (R. 1740) It was before the Commission in reaching its conclusions. As stated, this study treated Western Trunk Line, Southwestern and Mountain-Pacific territories separately. A reference to Exhibit 3 will disclose that Western Trunk Line and Southwestern territory costs compare more than favorably with Eastern District costs.

For example, using 25 tons as an average load, and 300 miles as an average haul, the cost II level, for box-car traffic, which includes all costs including rents and taxes, but does not include allowance for passenger and less-carload deficits or return on investment, shows the following:

East (Exeluding New Eng. & Nor. Ill.)	11.6¢
East (Including New Eng. & Nor. Ill.)	11.6¢
Southwestern (Inc. Sou. Mo.)	11.1¢
Western Trunk Line (Excluding Nor. Ill. and Sou. Mo.)	11.0¢
Western Trunk Line (Inc. Nor. Ill. and Excluding Sou. Mo.)	11.1¢

If these same costs are inflated to include not only all carload costs, including rents and taxes, but in addition, passenger and less-carload deficits and a 4% return on investment, (the Cost V (a) level), using the multiples provided therefor in the exhibit, the following are the relative costs:

East (Exeluding New Eng. & Nor. Ill.)	16.9¢
East (Including New Eng. & Nor. Ill.)	17.3¢
Southwestern (Inc. Sou. Mo.)	16.5¢
Western Trunk Line (Excluding Nor. Ill. and Sou. Mo.)	17.3¢
Western Trunk Line (Inc. Nor. Ill. and Excluding Sou. Mo.)	17.7¢

Clearly, on this study the conclusion is justified that the costs in Western Trunk Line and Southwestern territories are substantially similar to the costs in the Eastern District, and also, using the costs relied on by the Western Railroads, where on some bases the costs in the Western District are slightly less than, and on the other bases slightly more than, the costs in the Eastern Dis-

trict, the conclusion that the costs within the two territories are not substantially different, is justified.

It is submitted that the Western Railroads are not justified in picking out a few carefully selected parts of one portion of a study, and then contending that the Commission erred because it did not give controlling weight to the portions thus selected. The Commission considered all parts of all of the cost analysis, and from such consideration properly drew the conclusion that the costs of transportation as between the two territories did not differ substantially. Certainly we have seen no figures from any source which would begin to justify rates in the Southwestern and Western Trunk Line Zone III as much as 159.4 per cent of the Eastern level of Class rates. The Western Railroads are understandably silent on this subject. Presumably they see no difficulty in contending that because costs in the West can be shown in certain instances to be a small per cent higher than costs in the East in similar instances, it is, therefore, lawful for them to assess rates in the West 59.4 per cent higher than rates in the East.

The Commission finds, and the evidence supports the finding that:

> Comparisons based on the year 1939 and the period 1930-39 show the over-all cost of rendering transportation service in the western territory to be between 5 and 10 percent higher than in the East, excluding the Pocahontas territory. If the year 1941 were used, this difference would be reduced to 5 per cent or less. (R. 206)

Whether or not the small difference in costs in the entire Western District is such as to require a different Class rate level, was a question for the Commission to determine. That the Commission did not abuse its dis-

cretionary powers in finding that the costs were substantially similar, is demonstrated by the following comment of the Commission on the subject of territorial differences in Costs: (Report R. 201)

> A significant feature of all preceding comparisons is that the out-of-pocket costs (i. e., the directly assignable expenses) in the South and West are frequently as low as, or even lower than the out-of-pocket costs in the East. This is despite the fact that a uniform percentage of each expense item was taken in the East, South and West in computing the out-of-pocket costs, although the analysis of the out-of-pocket costs by territories indicated that, if anything, a somewhat larger percentage of the expenses in the East is variable with added traffic than is true of the South and West.

The complete accuracy of the ultimate findings of the Commission is attested by the fact that the Western Railroads have had much larger earnings than have the Eastern Railroads over a long period of years, and this condition continues down to date. For example, in the first eleven months of 1946, the net Railway Operating Income of the carriers in the Eastern District was 109 Million Dollars, and such income of the carriers in the Western District was 275 Million Dollars. (2)

Traffic Density in the East vs. in the West.

In an effort to lead the court to believe that the carriers in the Eastern District carry a great deal more traffic than the carriers in the Western District, the Western Railroads continuously reiterate the claim that the traffic density in the East is three times as great as in the West. As a pure technical state-

(2) "Railway Revenues and Expenses" Report for November, 1946, Association of American Railroads.

ment, this may approach the fact, but it is meaningless. Such figures are based on miles of road rather than miles of track. A six or eight track line from Philadelphia to New York is treated as the same number of miles of road as a single track in Texas over the same distance. Actually there is six times or eight times as many miles of track in the one instance as in the other, but traffic density figures such as used by the Western Railroads ignore this vast difference. The Western Railroads do not bother to explain this important factor to the court. The fact of the matter is, measured in revenue ton-miles, the traffic in the Western and Eastern Districts are very closely comparable. For the first 9 months of 1946, the carriers in the Eastern District hauled 158 Billion revenue ton-miles of freight; the carriers in the Western District hauled 178 Billion, and this greater ton-miles in the West reflects itself in the fact that during this period the freight revenue of the carriers in the Eastern District was 1609 Million Dollars and in the Western District 1753 Million Dollars. (3)

Due to the much more favorable earning capacity of the Western Railroads, the Commission found it necessary very recently to grant the Eastern Railroads, as to a large portion of their traffic, a five per cent greater general increase in rates than that granted the Western Railroads. (4)

The findings of the Commission as to relative territorial costs are supported by the record, and are unassailable here.

(3) Statement No. M-220 for September, 1946, I. C. C. Bureau of Transport Economics and Statistics.

(4) Increased Railway Rates, Fares and Charges, 1946, — I. C. C. —.

III.

UPON A FINDING THAT RATES ARE UNLAWFUL BECAUSE IN VIOLATION OF SECTION 3(1), THE COMMISSION IS EMPOWERED TO PRESCRIBE LAWFUL RATES, PURSUANT TO SECTION 15.

It is urged that the Commission is powerless under a finding that Section 3(1) has been violated, to do more than order the undue preference and prejudice removed by an alternative order. This contention would be correct only if the record were lacking evidence from which the Commission properly could prescribe a lawful rate pursuant to its power under Section 15.

The important findings of the Commission on this subject are the following: (R. 316)

> 3. That the relation between the interterritorial class rates applicable from southern, southwestern, and western trunk-line territories to official and Illinois territories, on the one hand, and the intraterritorial class rates applicable within official and Illinois territories, on the other hand, makes, gives, or causes, and for the future will make, give, or cause, undue and unreasonable preference and advantage to official and Illinois territories as a whole and the shippers and receivers of freight located therein, and subjects and for the future will subject, southern, southwestern, and western trunk-line territories as a whole and the shippers and receivers of freight located therein to undue and unreasonable prejudice and disadvantage, in violation of section 3 (1) of the act.
>
> 4. That a just and reasonable basis of class rates, not unjustly discriminatory or unduly preferential or prejudicial, to be observed by the respondents with respect to the traffic described in findings 1, 2, and 3 immediately preceding, will be the following:

Here it is noted the Commission made findings of violation of section 3 (1) of the Act, and exercised its power under Section 15 to prescribe lawful rates for the future.

Ignoring the fact that the Commission also made findings that the rates were unreasonable, in violation of Section 1 (4) and (5) (a) of the Act, (Report, R. 315-316), Appellants contend that the Commission was without power under this Section 3 (1) finding to prescribe a lawful rate for the future by an order under Section 15.

Although this Court frequently has stated that orders for the removal of preference and prejudice may be made under Section 3 rather than Section 15, Appellants deny that an order may be made solely under Section 3. The distinction this Court has made, is that orders made solely under Section 3, must give the carriers an alternative, that is, to remove the unlawful preference and prejudice either by raising the one rate or lowering the other, or both raising one and lowering the other, and that in such case, both rates must be subject to the control of the same carrier or group of carriers, *but that this is not true of orders prescribing lawful rates for the future made under Section 15.*

Thus this court stated in *St. Louis S. W. R. Co. v. U. S.*, 245 U. S. 136 p. 145:

> Furthermore, the order in the case at bar is not merely one to prevent discrimination. Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than, under similar conditions, to another; and they usually leave the carriers free to remove the discrimination either by raising the lower rate or by lowering the higher rate, or by doing both. *American Exp. Co. v. S. Dakota*, 244 U. S. 617, 624, 61 L. ed. 1352, 1357. *The order here complained of gives the carriers no such*

option. It directs that the rates to Paducah shall be 'not in excess of the rates at present in effect from the same points or groups to Cairo, Illinois.' In other words, *the Commission, having found the 22-cent rate unduly high reduces it to 16 cents* by establishing joint through rates. But the order is strictly one under section 15 of the Act to Regulate Commerce to reduce existing through rates by establishing joint rates, or, in the alternative, to establish new through route with joint rates. It is not primarily an order to remove discrimination in violation of section 3. (Emphasis supplied)

And again in *Youngstown Sheet & Tube Co. v. U. S.*, 295 U. S. 476 p. 480, in dealing with a case wherein the Commission had found one set of rates so low as to create discrimination and had ordered it raised, this court stated:

> There is no merit in the contention that the order was a Section 3 order and invalid for failure to afford the carriers an alternative of raising the contested rate or lowering others to remove discrimination. It is true the Commission found prejudice to shippers all rail, but in essence the order entered was a Section 15 order and not one made under Section 3.

Also, in *Texas & Pacific R. Co. v. U. S.*, 289 U. S. 627, p. 659, this court again drew the distinction:

> A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under paragraph 3 an alternative must be afforded.

To the above statement the Court appends note 39, in which the Court states:

> *This is not true of an order pursuant to paragraph 15 (1),* prescribing maximum or minimum or maximum and minimum rates; but the present orders were not issued under that section. (Emphasis supplied)

Prior to the passage of the Hepburn Act in 1906, (June 29, 1906; 34 Stat. 584) the Commission had no legislative powers. The legislative power to prescribe rates for the future, now contained in Section 15 of the Act, was not present. The Commission had power only to determine whether rates being charged were discriminatory or otherwise unlawful. If rates were found to be discriminatory, the Commission issued orders to cease and desist, but being without the legislative power to prescribe future rates, its orders went no further. Whether accurately or not, such orders were and are termed Section 3 orders, that being the section under which they are made. And an order today, made solely under Section 3, is made pursuant to that Section and not pursuant to Section 15. An order to cease and desist from continuance of an unlawful discrimination, without prescription of a future rate, would not fall within the purview of Section 15, which section deals with the legislative power to prescribe future rates.

Two conclusions result from a study of the history of the Interstate Commerce Act. (1) Prior to the Hepburn Act, orders to remove discrimination were made under Section 3, and lacking the power to prescribe what rate would be lawful for the future, such an order necessarily left the carriers an alternative as to the method of removal; there being an alternative, there necessarily had to be common control of both sets of

rates. Such orders can be, and still are, made today where there is no prescription under Section 15 of a lawful rate for the future. (2) The second conclusion is that after the Hepburn Act of 1906, the Commission, on a finding that the rates were unlawful in violation of Section 3, could by exercising the legislative powers delegated to it in Section 15, prescribe a rate that would be lawful for the future. The only prerequisite to such prescription of a future rate pursuant to Section 15, is that there be evidence upon which the Commission can determine what will be a lawful rate for the future. In this case there was ample and reliable evidence, and the Commission so found, as follows:

> While perfection has not been attained, we are convinced that the studies made and presented by members of our staff as evidence in this proceeding possess sufficient attributes of accuracy to enable us to rely upon them in reaching our conclusions. (Report R. 308)

The argument of Appellants summarizes down to this: That the legislative power to prescribe future rates contained in Section 15 of the Act, does not operate in conjunction with Section 3; and that as to discrimination resulting from undue preference and prejudice, the Commission has no legislative power but only the quasi-judicial power to determine that the undue preference and prejudice exists. Section 15 itself completely answers this argument. It provides, in part, that,

> Whenever, after full hearing *** the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever *** is or will be *** unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be just and

> reasonable individual or joint rate, fare or charge, or rates, fares or charges to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, *** *and* to make an order that the carriers shall cease and desist from such violation to the extent to which the Commission finds that the same will, or does, exist, and shall not thereafter publish, demand, or collect any rate, fare or charge for such transportation other than the rate, fare or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed ***. (Emphasis supplied)

When the Commission has found rates to be unlawful under Section 3, or any other Section, and, acting upon substantial evidence, exercises its legislative powers under Section 15 by prescribing lawful rates for the future, there is no occasion to grant the offending carriers an alternative, and equally no necessity that the rates be under the common control of the same carrier or group of carriers. It is when the Commission exercises only its quasi-judicial function of passing upon the lawfulness of existing rates, and does not exercise its legislative power to prescribe rates for the future, that, under a Section 3 finding, there must be an alternative method for correcting the unlawfulness found to exist, and common control of the rates causing the undue preference and prejudice. The confusion of the Appellants arises from failure to recognize this distinction. It is clear that when the Commission prescribes a lawful rate for the future, no alternative is, or can be given, nor is the question of a common source of discrimination of importance.

Even so, there is here, a common source of discrimination. The Official lines control both the rates within Official Territory and by refusal to join with other carriers in lawful through rates control the rates from other

territories to Official Territories. The class rates within and between territories are an interrelated group of rates, in which all of the carriers participate. The Commission properly found that the class rates "are not a lose aggregation of separately established rates, but a single entity composed of inter-related rates". (Report R. 305)

If under the Act as amended, making unlawful all rates which discriminate against regions, districts, and territories, and giving the Commission power under Section 15 to prescribe rates which will remove the unlawful discrimination, the Commission is yet without power to remedy the discrimination here found to exist, then a form of discrimination has been found which it is beyond the power of Congress ever to reach, for the intention of Congress could not be more plainly stated than it now is. As stated by this Court, "This language is certainly sweeping enough to embrace all discriminations it was within the power of Congress to condemn." *Houston E. & W. T. R. Co. v. U. S.*, 234 U. S. 342, p. 356; and also, "The legislative history of The Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at". *Louisville & N. R. Co. v. U. S.*, 282 U. S. 740, p. 749.

The correct construction of the Act, and that given it by this Court, is that if only the judicial power to determine that rates are unduly preferential and prejudicial in violation of Section 3 is exercised, the order must be in the alternative and there must be a common source of discrimination; however, if the legislative power of Section 15 to prescribe rates that will be lawful for future application also is exercised, no alternative need be, or can be, given, and it is immaterial whether or not there is a common source of discrimination.

The fallacy of Appellants' argument is that it assumes the Commission has no legislative powers to correct violations of Section 3 by the prescription of lawful rates for the future pursuant to Section 15.

IV.

THE COMMISSION DID NOT CONSTRUE THE 1940 AMENDMENT AS CHANGING ESTABLISHED PRINCIPLES OF RATE MAKING.

The Western Railroads contend that the Commission misinterpreted the Transportation Act of 1940, and particularly section 5(b) (54 Stat. 902) thereof. Specifically, it is contended that the Commission construed the amendment as "a mandate to the Commission to change the recognized elements of rate making to hold unlawful rates which were lawful at the time of the initiation of this proceeding."

In considering this contention, the Court should consider all pertinent parts of the Transportation Act of 1940. By that Act the Transportation Act of 1920 was amended in numerous particulars, but those parts of the 1940 enactment which directly bear upon this proceeding are as follows:

The first paragraph sets forth the "National Transportation Policy." It is therein declared to be the National Transportation Policy, *inter alia*, "to encourage the establishment and maintenance of reasonable charges for transportation service without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

Section 5(a) of the 1940 Act begins with the statement that section 3 (1) of the Transportation Act of 1920 is thereby amended by the addition of the words "region, district, territory." Thus discrimination against regions,

districts and territories was specifically declared to be unlawful and prohibited.

Section 5 (b) of the 1940 Act then proceeds as follows:

> The Interstate Commerce Commission is authorized and directed to institute an investigation into the rates on manufactured products, agricultural commodities, and raw materials, between points in one classification territory, and points in another such territory, and into like rates within any of such territories, maintained by common carriers by rail or water subject to part I of the Interstate Commerce Act, as amended, for the purpose of determining whether said rates are unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist.

Did the Commission construe section 5(b) of the 1940 Act as changing the recognized elements of rate making, as contended by the Western Railroads? A review of the reports of the Commission will demonstrate clearly that it did not.

The subject of the Transportation Act of 1940 is covered in the original report at pages 688-692. (R. 303-307) This report discloses that the Commission considered the 1940 Act in its entirety, and concluded that the substantive change in the law was brought about by the amendment of section 3 (1) whereby discriminations against regions, districts and territories were brought within the purview of the Act, and were made unlawful, and that section 5(b) was a directive to the Commission to investigate the rates to determine whether such violation of law existed and if found to exist to order it removed.

The following excerpts from the original report establish that the Commission did not construe section 5(b) of the 1940 Act as establishing "a new standard of rate making", but read it in the light of the public policy sought to be accomplished by the Transportation Act of 1940, which was the removal of discriminations against regions, districts and territories:

> *** By the Transportation Act of 1940, section 3 (1) of the Act was amended by the addition of the words 'region, district, territory'. Coupled with that amendment was a provision designated as section 5(b) of the amendatory act of 1940. It authorized and directed us to investigate the rates on manufactured products, agricultural commodities, and raw materials between and within classification territories for the purpose of determining whether such rates are unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness found to exist. ***
>
> Another new provision was attached to the Transportation Act of 1940 and designated as the 'National Transportation Policy.' In general terms, Congress undertook to express the policy which it had in mind in providing for the regulation of all modes of transportation and required that all provisions of the act shall be administered and enforced with a view of carrying out that policy. One of the declared purposes in this declaration of policy is 'to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.'
>
> Have these amendments to the act added any new inhibitions against discrimination or enlarged the power of the Commission over this subject? In seek-

ing an answer to this question it is pertinent and helpful to review briefly the legislative background of these amendments. (Report. R. 303-304)

••• A region, district, or territory usually imports a definite entity, geographically, economically, and socially, and the word 'territory' as applied to rate making has come to have a special meaning of its own, indicating a separate and distinct rate structure. The legislative history of the amendment of 1940 discloses quite clearly that Congress was aware of that special transportation significance. (Report. R. 305)

••• The method employed to accomplish this purpose is equally plain. By the amendment to the substantive anti-discrimination provisions of section 3 (1) all discriminations in the form of undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, as between regions, districts, or territories, viewed as separate entities, were brought directly within the purview of the act along with all the other inhibitions previously included. We were then authorized and directed by the other provisions mentioned to remove any such discriminations found to exist in a proper proceeding. This means that such discriminations as those mentioned which result from differences in the methods of distributing the general rate burden in the several rate-making territories, or from any other cause, *if not justified upon proper consideration of recognized elements of rate making* applied in the light of the amended law are unlawful and should be corrected. (Report R. 307) (Emphasis supplied)

The Commission used both the Declaration of Policy set forth in the 1940 Act, and section 5(b) as aids in determining the intention of Congress in amending section 3 (1) by addition of the words "region, district territory." It did not construe section 5(b) as estab-

lishing any new standard of rate making, nor did it apply any new standard.

The supplemental report evinces no different interpretation. It will be noted in the supplemental report (R. 432) that the Commission treated section 5(b) of the Transportation Act of 1940, only as "supplementing and reinforcing" its power under section 15 to order removal of any unlawfulness in the rates, *after* such unlawfulness has been found to exist. It specifically appears that in prescribing the rates for the future the Commission considered only established and well recognized standards of rate making. It states:

> The differences in such rates and the effect upon the welfare of carriers, producers, shippers, consumers, and upon the welfare of localities, districts, regions, and territories were fully discussed in the report. The costs of service were considered, together with the consist of traffic, the distribution of the general rate burden, rate and revenue comparisons, and other matters. (R. 465)
>
> * * * * *
>
> In reaching our conclusions as to the necessity for increases in official and Illinois territories, and reductions in the other territories and interterritorially, we gave consideration not only to the factors previously mentioned, but also to the rates of return of the carriers in the respective territories and to their ability to render efficient service. (R. 466)

The Western Railroads contend that this case falls within the doctrine of *Ann Arbor R. Co. v. United States*, 281 U. S. 658. Actually the two cases have little or no similarity. In the *Ann Arbor Case* the Court was dealing with the so-called Hoch-Smith Resolution, (43 Stat. 801) which was a joint resolution of Congress directing the Commission to conduct investigations into the rates

on various commodities, and to establish "the lowest possible lawful rates." The Court held that the Commission had misconstrued the resolution as working a change in the usual standards of rate making and as requiring the prescription of rates lower than otherwise would have been proper. The Court stated that to permit such construction would raise a serious question respecting the constitutional validity of the resolution, and that by reason of the uncertain meaning of the words used and of the constitutional questions which would be raised if they were given the meaning the Commission sought to give them, the Court thought they must be held to work no substantial change in the law.

It was not because of the nature of the enactment that the Hoch-Smith Resolution was held to work no substantial change in the law. A joint resolution can be as effective to change the basic law as can any other method. *Levey v. Stockslager*, 129 U. S. 470; *Davidson Gulfport F. Co. v. Gulf & Ship Island R. Co.*, 92 F. (2d) 107, p. 113. The Court held only that this resolution, standing alone, was not intended to work any basic change in the law.

Section 5(b) did not stand alone, unaccompanied by other legislation. Unlike the Hoch-Smith Resolution, it was an integral part of an entire enactment—The Transportation Act of 1940. By this legislation, numerous changes in the basic law were made. Among others, section 3 (1) was specifically amended to make unlawful, discriminations against regions, districts, and territories. The Commission construed section 5(b) in the light of this admitted amendment to section 3 (1) and properly concluded that section 5(b) authorized and directed it to give effect to this new inhibition against discrimination. It did not construe section 5(b) as altering in any

way the accepted standards of rate making, nor did it apply any different standards.

The District Court gave extended consideration to this contention of the Western Railroads. With meticulous care it analyzed the action of the Commission, and concluded that:

> It does not appear that the Commission has herein acted upon any assumption that the 1940 changes altered the basic principles governing its action. On the contrary, it appears that in determining the existence of discriminatory rates it has construed the changes in the statute to mean that where it is found that class rates are different in the different territories, and interterritorially, and those differences cannot be justified under recognized principles of rate making by proof of sufficient differences in costs of transportation, composition and amount of traffic, competition by common carriers other than railroads, and the like, those rates may be found unjustly preferential or prejudicial because unduly discriminatory and consequently unlawful as between regions, districts and territories. (R. 1431)

The 1940 Amendment, for the first time, made unlawful, discrimination as between regions, districts and territories. The Commission did no more than to apply recognized standards of rate-making to determine the issue as to whether these newly protected objects were being subjectd to unlawful discrimination.

V.

EVIDENCE TO SUSTAIN A FINDING OF UNLAWFUL DISCRIMINATION AGAINST REGIONS, DISTRICTS AND TERRITORIES, DIFFERS FROM EVIDENCE REQUIRED TO ESTABLISH UNLAWFUL DISCRIMINATION AGAINST THE OBJECTS PROTECTED FROM DISCRIMINATION PRIOR TO THE 1940 AMENDMENT.

Prior to the 1940 Amendment to Section 3, that section protected only localized objects against discrimination, as for example particular persons, particular firms, and particular localities. It did not protect the more general objects, as regions, districts and territories. These latter were added by the 1940 Amendment. And before these more general objects were added, the Commission and the Courts uniformly held that evidence of undue preference and prejudice must be such as to show injury resulting to the particular objects named in the statute before it could be held to be an unlawful discrimination. Hence, if it were sought to show that particular shippers were being subjected to unjust discrimination, the proof had to establish that these particular shippers were being injured; in other words were in direct competition with the preferred shipper or shippers. The same was true of particular localities. This is the type of evidence still required when it is sought to remove discrimination as to these particular objects.

Appellants now contend that this same type of evidence is required to establish proof of undue preference and prejudice between regions, districts and territories. They contend that a larger number of individual shippers and localities should have testified as to the injury resulting to them. What Appellants overlook is that evidence which would establish injury to an individual shipper or locality, would not essentially establish, or

even indicate, injury to a territory. In fact, a rate structure highly prejudicial and injurious to a territory, might be beneficial to certain individual shippers within that territory. A shipper desiring to serve only a very small area from its plant location, would, and in fact normally does, prefer to have the rates into that territory on a high level. As he ships only very short distances, his competitor attempting to come in from a greater distance, is thus placed at a disadvantage. Thus rates injurious to a whole territory, are beneficial to this particular shipper.

The type of evidence sufficient to establish injury to a territory, is evidence to show economic injury to the whole territory. Even Appellants do not contend that the record was not replete with this type of evidence. It is fully set forth in the Government's brief, and it should not be necessary to repeat it here. The evidence of the great injury done and being done to the West, Southwest and South, by reason of a structure of intra-territorial and interterritorial rates which prevents or handicaps location of industry in those territories, and encourages location of industry in official territory, was overwhelming in the record before the Commission. This was the nature of the evidence offered. Purely as representative, evidence of particular shippers located in the West, Southwest and South who were actually attempting to compete interterritorially with competitors located in official terriory, was presented. An example is the testimony of E. G. Plowman, traffic manager of the Colorado Fuel and Iron Corporation of Pueblo, Colorado. (R. 2495) This witness testified as to the striking similarity between the average situation and the situation of the Colorado Fuel and Iron Co. (R. 2497) that the present rate structure retards the Eastbound selling efforts of his concern, and supported this statement with

numerous representative examples; that because of the freight rate penalty his firm was unable to distribute East of the Missouri River, and that the penalty of higher class rates quickly checked the selling efforts of any concern such as the Colorado Fuel and Iron Corporation eastbound into Western Trunk Line and Northern Southwestern Lines Territory. The Transportation Commissioner of the Minneapolis, Minnesota, Traffic Association (R. 3120) testified as to the many industries that have removed from that city to official territory since 1920 because of the discriminatory class rates. (R. 3125) There were numerous such witnesses to offer testimony representative of the situation in Western, Southwestern and Southern territories. Such evidence would not have been necessary, but was simply corroborative of the testimony of expert economists, such as Witness Spotswood, (R. 1358) as to the injurious effects of the discrimination of the general economy of the West and South.

It is obvious that evidence appropriate to prove discrimination against particular shippers and particular localities is not the same as evidence which will establish discrimination against territories. Were it otherwise, there would have been no occasion for the 1940 Amendment to add regions, districts, and territories to section 3 of the Act. After the Amendment of 1940, where the issue is that of undue preference to one territory and undue prejudice to other territories, the type of evidence to be required is evidence appropriate to establish injury to regions, districts and territories. This is done when evidence of economic loss and injury to these areas is presented. To give effect to the contention of Appellants, would render useless the new prohibition against discrimination to regions, districts and territories; a proceeding requiring all of the particular shippers, firms and localities in an entire territory to

produce evidence of their particular situation, would extend interminably and have no foreseeable end. In fact, the Attorney for the Western Railroads, in the proceeding before the Commission, objected to testimony as to the situation of particular localities when such evidence was attempted, and addressed the following question to the bench:

> If the Commission please, does that not bring up the question at once, as to how far the Commission is going to inquire into local situations in connection with this proceeding? Apparently this witness here is dealing with a situation that he regards as peculiar to Wichita. (R. 3220)

Now Appellants complain that the record is deficient in that it is claimed to lack sufficient evidence of discrimination against particular localities and shippers.

It is submitted that evidence to establish a violation of Section 3 as to regions, districts and territories, is properly evidence concerning the economic effect of discriminatory rates on regions, districts and territories, such as abounds in the record, and is not evidence of the effect of the rates upon individual shippers and localities, as now urged by Appellants.

VI.

THE POWER OF THE COMMISSION TO PRESCRIBE FUTURE RATES IS LEGISLATIVE, AND DOES NOT TERMINATE WHEN ONCE EXERCISED.

In part IV of their brief, beginning on page 163 thereof, the Western Carriers, under a heading which appears to bear little relation to the context, expound the doctrine that because the Commission, in previous decisions, has prescribed most of the class rates, that it is now precluded from making the order here under attack. The contention is not set forth in this form, doubtless for the reason that when clearly stated, the contention is patently contrary to law. The argument, therefore, is veiled, and is made to appear as follows: That in previous cases the Commission has made certain findings concerning the financial needs of the Western Railroads; that the present decision appears not to follow these previous findings; therefore in the present decision the Commission has ignored the financial needs of the Western Railroads. But it all comes around to the contention that once the Commission has prescribed a rate, it loses jurisdiction ever to prescribe a different rate.

The Western Railroads start back in 1925, with a proceeding known as *Ex Parte 87*. (113 I. C. C. 3) They seem yet to harbor ill will toward the Commission for denying them the increases there sought. We had supposed that the four years immediately following (1926 to 1929, inc.),—except for the war years of 1943-1945, inc., the most prosperous series of years ever experienced by the American Railroads,—had sufficiently demonstrated the wisdom of the decision of the Commission in that proceeding.

Next they take up the decision in *Western-Trunk Line Class Rates*, Docket 17000, Part 2. (164 I. C. C. 1) decided May 6, 1930, and show that there the Commission

granted increases in the class rates under the hope,—never to be realized—, that the higher rates would yield the Western Railroads additional revenue. The higher rates failed to produce the anticipated additional revenue, and the Western Railroads by some unrevealed line of reasoning, place the blame for this upon the Commission. The fact is, the rates proved much too high to move the traffic, and as shown herein above, the carriers voluntarily reduced them drastically.

The Western Railroads next contend that their rate level has declined over a long period of years and set out, at page 173 of their brief, a table which they contend shows this decline. The table is utterly without meaning unless accompanied by data to show the average length of hauls. As length of haul increases, revenue per ton-mile decreases, and the length of haul has greatly increased throughout the period shown on the table, a fact well known to these Western Railroads. The average haul, *i. e.*, the average distance each ton of freight was carried, treating all railroads as a unit, lengthened from 288.18 miles in 1918 (the first year shown on the table) to 473.28 miles in 1944. (5) If the impression the Western Carriers attempt to leave were correct, the relative rate level within the various districts would be easily established by mere reference to the relative ton-mile earnings. For example, the Western Carriers contend the general rate level in the Western District is much higher than in the Eastern District. However, the earnings per ton-mile during the first ten months of 1946 were 1.025 cents in the Eastern District and .982 cents in the Western District. (6) This would appear to disprove the contention that the rate level in the Western District is higher than in the East-

(5) Statistics of Railways in the United States, 1944. Table 155, page 154.
(6) Statement No. M-220, October 1946, I. C. C. Bureau of Transport Economics and Statistics.

ern District, and in fact to establish the absolute contrary. The fact is, like the table presented by the Western Carriers, it proves precisely nothing at all.

Next, these carriers, beginning on page 175 of their brief, make the most amazing and unjustified condemnation of the Commission yet encountered. They lay at the door of the Commission the full responsibility for the unfortunate series of rail bankruptcies which followed in the wake of the depression which haunted the decade of the thirties. No reasonably informed person believes the rate level was even a remote factor in these bankruptcies. Blythely ignoring both the record and the fact, these Appellants avow, without any record reference whatsoever because there is nothing in the record to which they could refer, that these bankruptcies were occasioned by decisions of the Commission in investigations made pursuant to the Hoch-Smith Resolution, which decisions, they aver, again without reference to anything in the record, greatly reduced the rates on agricultural products. While we believe these decisions raised rather than lowered rates on agricultural products, the question appears to have little bearing here.

But these carriers aver that "About 1935" a trend set in, due to these rates prescribed by the Commission, which "produced its inevitable result". They then set forth (page 177) a list of Western Railroads which presumably were forced into bankruptcy by the events of "about 1935".

The fact of the matter is, of the 58,400 miles of railroad there set forth, only 9,143 miles went into bankruptcy after 1935; a great part of the bankruptcies occurred in 1933 and earlier years. (7) The seeds for these bankruptcies were sown long before the Hoch-Smith Resolution was adopted, and the great depression of the

(7) Annual Reports of The Interstate Commerce Commission, 1933, 1934, 1935.

thirties merely supplied the push. Neither the Interstate Commerce Commission nor the general rate level had anything to do with it. Railroads operating side by side and in direct competition, and on the same rate level as these bankrupt lines, experienced no difficulty in surviving this period, as witness such Western Railroads as the Santa Fe, the Burlington, the Union Pacific, the Southern Pacific, the Great Northern and The Northern Pacific. Together these strong financial carriers operate a very large portion of the mileage in the Western District. Is the Interstate Commerce Commission to have credit for their enviable financial position, or does it take only the blame for the bankruptcies brought on by years of financial mismanagement and manipulations?

From all of this, however, the Western Railroads argue that in its decision, the Commission ignored the financial needs of these carriers. The report of the Commission refutes this contention. The Commission analyzed the revenue needs of the carriers in the various districts, found that the Eastern District rail lines were in need of additional revenue, (R. 470)—a conclusion fully borne out by subsequent events—found they handle a larger portion of their traffic on class rates than do carriers in the other districts, found these rates were unreasonably low; it found the class rates in the West were unreasonably high—too high to move the traffic; found but 0.6 percent of the carload traffic was moving on them in Western Trunk Line Territory and but 2.4 percent in Southwestern Territory (R. 310). Upon a finding, amply supported by evidence, the Commission found the class rates in Western Trunk Line and Southwestern Lines Territories to be unreasonable considering "cost of service, consists of the traffic, distribution of the rate burden, and other factors usually given weight in de-

termining lawful rates." (R. 311) For the court to reverse this finding of the Commission, the scope of judicial review of the decisions of the Commission will have to be enlarged to a point where the Commission will cease to be the rate making body and the Court substituted therefor.

VII.

THE DECISION AND ORDER OF THE COMMISSION IN EX PARTE 162, INCREASED RAILWAY RATES, FARES AND CHARGES, 1946, HAVE NOT ALTERED THE RATE SITUATION UNDER THE COMMISSION'S ORDERS IN THE INSTANT CASE AND HAVE NOT MADE THE COMMISSION'S ORDERS IN THE INSTANT CASE OBSOLETE AND IMPOSSIBLE OF ENFORCEMENT ACCORDING TO THEIR TERMS.

Appellants in Nos. 343 and 344 urge upon the Court that the Order of the Commission in the instant case should be annulled and enjoined, because that Order has become obsolete and impossible of enforcement by reason of the decision in *Ex Parte* 162.

It should be noted that Appellants in No. 345 are not urging this doctrine in their briefs in these proceedings, nor do the Appellants in the other cases go so far as to urge that the proceedings have become moot.

By petitions filed in the spring of 1946, all railroads in the United States applied to the Interstate Commerce Commission for certain increases in rates, and urged that such increases were necessary because of conditions that had developed in 1946 and which would possibly continue through 1947 and beyond.

The Interstate Commerce Commission was restrained, by action of the Appellants in 343 and 344, from basing any increase in revenues for the Appellant railroads herein, or railroads in other districts in the United

States, upon the basis of rates prescribed by the Orders here under investigation, and therefore the Interstate Commerce Commission was required to base its findings in the *Ex Parte* 162 proceedings upon the rates as were in effect prior to the issuance of its Orders of May 15 and October 30, 1945, now here for review.

Appellant's statements are misleading in many instances and are not statements of fact in other instances. On pages 152 and 153 of the brief for the State of New York, *et al.*, filed herein, dated February 8, 1947, it is stated that the railroads in Official Territory were permitted to increase their class rates 25 percent, *"the maximum sought by the railroads to render their rates compensatory in the light of their increased costs."* Nowhere in the petition of the carriers to the Commission for these increases, nor in the evidence presented by Official Territory Carriers will any statement of this nature be found, and it must, therefore, be a gratuitous conclusion of the authors of the New York brief.

The Interstate Commerce Commission, in both its Interim Order in *Docket Ex Parte* 162, dated June 20, 1946, and its Final Order dated December 5, 1946, thoroughly discussed the peculiar conditions under which that Commission was forced to act by reason of the pendency of the restraining order against its Orders issued in Docket No. 28,300. And it sets out on sheet 12 of its report dated June 20, 1946, that the petitioning railroads had suggested that any increase should be: "Conditioned that if and when the order in the class rate proceeding becomes effective, the same percentage increase shall apply to the class rates prescribed in that case."

In its final report, in *Ex Parte* 162, dated December 5, 1946, the Commission, in Finding 20, on sheet 65, said: "As the effectiveness of our order in *Class Rate Investigation*, 1939, docket 28,300, is now stayed and enjoined,

we do not hereby in any manner suspend or supercede, or modify or effect the findings and order entered in that proceeding."

We respectfully submit that this Court should not concern itself with the manner and form with which the Interstate Commerce Commission might apply its Order, which is here under review, if that Order be found to have been lawfully promulgated. If there be a chaotic situation, which we deny, resulting from the increases granted in the *Ex Parte* 162 proceedings, as contrasted with the Order now under review, that chaotic situation was produced by the Appellants in Nos. 343 and 344, and this Court should give little heed to any complaint which results solely from the action of these Appellants.

CONCLUSION.

For the reasons stated, the final decree of the Court below should be affirmed.

Respectfully submitted,

THE STATE OF ARKANSAS,
By: Ben Laney, Governor.

ARKANSAS PUBLIC SERVICE COMMISSION,
(Successor to ARKANSAS CORPORATION COMMISSION),
By: J. C. Murray, Special Attorney,
Little Rock, Arkansas.

THE STATE OF KANSAS,

STATE CORPORATION COMMISSION OF KANSAS,

KANSAS INDUSTRIAL DEVELOPMENT COMMISSION,
By: Byron M. Gray, Special Attorney,
Topeka, Kansas.

THE STATE OF NEBRASKA,

NEBRASKA STATE RAILWAY COMMISSION,

By: Duane T. Swanson, Commissioner,
Walter R. Johnson, Attorney General,
H. Emerson Kokjer, Deputy Attorney General,
Lincoln, Nebraska.

THE STATE OF NORTH DAKOTA,

By: Nels G. Johnson, Attorney General,
Bismarck, North Dakota,
Neal E. Williams, Special Assistant
Attorney General,
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PUBLIC SERVICE COMMISSION OF THE
STATE OF NORTH DAKOTA,

By: James Hanley, Commerce Counsel,
Mandan, North Dakota.

THE STATE OF OKLAHOMA,

CORPORATION COMMISSION, STATE OF OKLAHOMA,

By: C. B. Bee, Special Counsel,
Oklahoma City, Oklahoma.

THE STATE OF SOUTH DAKOTA,

PUBLIC UTILITIES COMMISSION OF THE
STATE OF SOUTH DAKOTA,

By: William Williamson, Assistant Attorney General,
Pierre, South Dakota.

THE STATE OF TEXAS,

RAILROAD COMMISSION OF THE STATE OF TEXAS,

By: Price Daniel, Attorney General of Texas,
James D. Smullen, Assistant Attorney General,
Charles D. Mathews, Assistant Attorney General,
Austin, Texas.

Dated:
February 24, 1947.

